No. 82-2013

Office-Supreme Court, U.S.
FILED
JUN 10 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE STATE OF TEXAS, ET AL.,
Petitioners

VS.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JIM MATTOX
Attorney General of the
State of Texas

DAVID R. RICHARDS
Executive Assistant

GILBERT J. BERNAL, JR.*
Assistant Attorney General
Chief, Taxation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4721

Attorneys for Petitioners
**Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

1. Whether the authority of the State of Texas to regulate nonresident sellers and Texas wholesalers under the Twenty-first Amendment may be preempted by the United States' attempts to avoid the Texas gallonage tax which is levied solely on Texas wholesalers and not the federal government.

2. Whether the United States may preempt Texas regulation of nonresident sellers and Texas wholesalers where the United States failed to show there was an actual conflict between provisions of the Texas Alcoholic Beverage Code and federal law.

3. Whether the United States Court of Appeals for the Fifth Circuit erred in rendering its decision under the concepts of exclusive and concurrent federal jurisdiction, theories which were neither alleged nor proved by Respondent at trial, instead of applicable United States Supreme Court opinions dealing with "conflict" under the Supremacy Clause.

LIST OF PARTIES

PETITIONERS:

The State of Texas, the Texas Alcoholic Beverage Commission, and W.S. McBeath, Administrator of the Texas Alcoholic Beverage Commission, and

Licensed Beverage Distributors Association, whose members are:

Accent Wine & Spirits
American Wine
Block Distributing Company
Glazer Wholesale Drug
Golman Wholesale Liquor Co., Inc.
Key Distributors, Inc.
Lone Star Company
Longhorn Liquors, Ltd.
McKesson Wine & Spirits
Quality Beverage Company
Schepps Wholesale Liquors
Tarrant Distributors
Terk Distributing Company
White Rose

RESPONDENT:

United States of America in behalf of the Department of the Navy, Consolidated Package Store, Beeville Naval Air Station and other nonappropriated fund instrumentalities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS ..... iii-iv

TABLE OF AUTHORITIES ..... iv-vi

OPINION BELOW 1,2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2-5

REASONS FOR GRANTING THE WRIT 5

I. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH SUPREME COURT DECISIONS WHICH WOULD UPHOLD THE CONSTITUTIONALITY OF THE TEXAS GALLONAGE TAX AS IT AFFECTS RESPONDENT 5-10

II. THE WRIT SHOULD BE GRANTED BECAUSE THE OPINION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH RULINGS OF THE SUPREME COURT DEALING WITH EXCLUSIVE JURISDICTION AND WITH THE SUPREMACY CLAUSE AS IT APPLIES TO TWENTY-FIRST AMENDMENT CASES 10-30

CONCLUSION 30

APPENDIX

A — JUDGMENT AND OPINION OF COURT OF APPEALS ..... A-1—A-12

B — OPIONION AND ORDER DENYING PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC B-1

C — MEMORANDUM OPINION AND ORDER OF DISTRICT COURT ..... C-1—C-11

D — ORDER OF DISTRICT COURT DENYING MOTION FOR SUMMARY JUDGMENT ..... D-1—D-4

E — ARTICLE VI AND AMENDMENT XXI OF UNITED STATES CONSTITUTION ..... E-1—E-2

F — 50 U.S.C. APP. § 473 ..... F-1

G — TEXAS ALCOHOLIC BEVERAGE CODE PROVISIONS ..... G-1—G-4

H — 32 C.F.R. § 261.4(c) H-1

TABLE OF AUTHORITIES

CASES — Page

Alabama v. King & Boozer, 314 U.S. 1 (1941) 9,10

California v. LaRue, 409 U.S. 109 (1972) 18

Carter v. Virginia, 321 U.S. 131 (1944) 14

Castlewood International Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979), judgment vacated, 446 U.S. 949 (1980), on remand, 626 F.2d 1200 (5th Cir. 1980) 26-28

City of Detroit v. Murray, 355 U.S. 489 (1958) 8

Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) 6,11

Craig v. Boren, 429 U.S. 190 (1976) 18

First Agricultural National Bank v. Tax Comm'n, 392 U.S. 339 (1968) 6

Heublein, Inc. v. South Carolina Tax Commission, 409 U.S. 275 (1972) 15-23,26

Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964) 14,19

James v. Dravo Contracting Co., 302 U.S. 134 (1937) 6,8

Lafayette Royale Apartments, Inc. v. Meadow Brook National Bank, 397 F.2d 378 (5th Cir. 1968) 13

Leizerowski v. Eastern Freightways, Inc., 514 F.2d 487 (3rd Cir. 1975) 13

Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) 10,30

National Railroad Passenger Corporation v. Miller, 358 F.Supp. 1321 (1973), *aff'd without written opinion*, 414 U.S. 948 24-26

Pacific Coast Dairy, Inc. v. Dept. of Agriculture, 318 U.S. 285 (1943) 12

Penn Dairies v. Milk Control Commission, 318 U.S. 261 (1943) 14,20,21,24,29,30

Polar Ice Cream and Creamery Company v. Andrews, 375 U.S. 361 (1964) 6-8,14

Rice v. Norman Williams Co., _____U.S._____, 102 S.Ct. 3294 (1982) 11,23

Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1964) 18,21

Standard Oil v. California, 291 U.S. 242 (1934) 8

United States v. County of Fresno, 429 U.S. 452 (1977) 6,8,9

United States v. State of Texas, 695 F.2d 136 (5th Cir. 1983) 1,10,11,15,27,28

United States v. Tax Commission of Mississippi, 412 U.S. 363 (1973) 11-14,19

United States v. Tax Commission of Mississippi, 421 U.S. 599 (1975) 5,6,12

United States ex rel. Huisinga v. Commanding Officer, 446 F.2d 124 (8th Cir. 1971) 13

Wine Industry of Florida, Inc. v. Miller,
609 F.2d 1167 (5th Cir. 1980) 21

Wolf v. Frank, 477 F.2d 467 (5th Cir. 1973),
cert. denied, 414 U.S. 975 13

STATUTES

15 U.S.C. § 381(a) 16-20,22,23
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1345 2
28 U.S.C. § 2201 2
28 U.S.C. § 2202 2
45 U.S.C. § 546(c) 25
50 U.S.C. App. § 473 19-26,29

TEX. ALC. BEV. CODE ANN. § 11.01 (Vernon 1977) 2
TEX. ALC. BEV. CODE ANN. § 19.01 (Vernon 1977) 2,3,15
18,20-22
TEX. ALC. BEV. CODE ANN. § 20.01 (Vernon 1977) 2,3
TEX. ALC. BEV. CODE ANN. § 22.01 (Vernon 1977) 2,3
TEX. ALC. BEV. CODE ANN. § 37.01 (Vernon 1977) 2,3,15
18,20-22
TEX. ALC. BEV. CODE ANN. § 201.02 (Vernon 1977) 2,7
TEX. ALC. BEV. CODE ANN. § 201.03 (Vernon 1977) 2,5,7
TEX. ALC. BEV. CODE ANN. § 201.05 (Vernon 1977) 2,7

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. vi, cl.2 2,8,10,11
U.S. Const., amend. xxi ..... 2, *passim*

REGULATIONS

32 C.F.R. § 261.4(c) ..... 2, *passim*

OTHER AUTHORITIES

1951 U.S. Code Cong. & Admin. Service, Vol. 1,
73-86 20

House Report No. 271, 1951 U.S. Code Cong. & Admin.
Service, Vol. 2, 1472 23-24

No._____

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THE STATE OF TEXAS, ET AL,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, the State of Texas, the Texas Alcoholic Beverage Commission and W.S. McBeath, Administrator of the Texas Alcoholic Beverage Commission, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on January 10, 1983.[1]

OPINIONS BELOW

The Court of Appeals' opinion is reported at 695 F.2d 136 (5th Cir. 1983) and is reprinted, along with the Court's judgment, as Appendix "A" in the separately bound volume of appendices filed herewith (hereafter cited as "App."). The order denying the Petition for Rehearing and the Suggestion for Rehearing En Banc is noted at _____ F.2d _____ (5th Cir. 1983) and is reprinted as Appendix "B".

1. This Petition is intended to be considered together with the Petition of Petitioner, Licensed Beverage Distributors Association, filed concurrently with this Petition.

JURISDICTION

The Court of Appeals rendered its decision in this case on January 10, 1983. A timely Petition for Rehearing and a Suggestion for Rehearing En Banc were denied on March 17, 1983, and this Petition has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C.§1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The principal constitutional provisions involved are the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and the Twenty-first Amendment to that Constitution, respectively cited as U.S. Const., Art. VI, cl.2 and U.S. Const. amend. XXI. The federal statute involved is 50 U.S.C. App.§ 473, the Universal Military Training and Service Act, and the state statutes involved are TEX. ALC. BEV. CODE ANN. §§11.01, 19.01, 20.01, 22.01, 37.01, 201.02, 201.03 and 201.05 (Vernon 1977). The federal regulation involved is 32 C.F.R. § 261.4(c). Since the provisions of these laws are lengthy, their pertinent texts are set forth in the Appendix in the above-cited order.(App. E - H).

STATEMENT OF THE CASE

Proceeding under the District Court's jurisdiction in 28 U.S.C. § 1345 and 28 U.S.C. §§ 2201 and 2202, on April 23, 1979, Respondent, United States of America, on behalf of the Consolidated Package Store (hereafter "CPS") at the Beeville Naval Air Station (hereafter "Naval Station"), and other non-appropriated fund instrumentalities (NFIs) located on military bases in Texas, sued Petitioners for the purpose of allowing NFIs to purchase alcoholic beverages directly from nonresident sellers outside the State free of taxation by the State under TEX. ALC. BEV. CODE ANN. § 201.03 (Vernon 1977)(App. G). While Respondent sought to make purchases free of the gallonage tax in § 201.03, that tax is not imposed on Respondent, but is instead imposed on Texas wholesalers who incorporate that tax into their prices to retailers such as the CPS. Moreover,

Petitioners have never required or requested Respondent to obtain any Texas alcoholic beverage permits.

Under the Texas regulatory three-tier system (§§ 37.01, 19.01, 20.01 and 22.01), the only permittees involved herein are nonresident sellers who under TEX. ALC. BEV. CODE ANN. § 37.01 (Vernon 1977)(App.G) are authorized to solicit and take orders from and ship liquor into Texas to wholesalers who under TEX. ALC. BEV. CODE ANN § 19.01 are authorized to purchase and import liquor from nonresident sellers. These wholesalers in turn sell alcoholic beverages to retailers such as the CPS. Based on valid taxation and regulatory grounds, discussed *infra*, Petitioners seek to continue their longstanding enforcement of the provisions of the Alcoholic Beverage Code (the Code) which require nonresident sellers to sell only to authorized Texas wholesalers.

Long after suit had been filed, Respondent made a purchase from one nonresident seller, Frank-Lin Distillers of California, citing as its authority to do so a Department of Defense regulation, 32 C.F.R. § 261.4(c) (App. H) which states that the purchase of alcoholic beverages for resale at any camp or base shall be done in a manner which obtains "the most advantageous contract, price and other factors considered." Despite Respondent's interpretation of this regulation as requiring the cheapest prices for its liquor (III.R.,12), (I.R.,II.R. and III.R refer to volumes of the original record), Respondent's witness, Robert Lee Francke, testified that in ordering liquor for the CPS, he followed an informal procedure, without taking any bids or advertising. (III.R., 24, 28, 129). Francke did not know whether his manager at the NFI, who placed the liquor order with National Distillers of New York, which National refused to fill as being in violation of its Texas nonresident seller's permit (III.R., 26; I.R., 38), had contacted any other nonresident sellers to look for cheaper prices. (III.R., 26). Francke further admitted he did not know whether National Distillers was providing the

cheapest prices or the most advantageous contract even in comparison with a Texas wholesaler. (III.R., 27, 32). While his testimony showed that the CPS was not actively pursuing the cheapest prices, Francke did allude to "other factors" besides price which could lead to "the most advantageous contract" such as the Texas wholesalers' giving same day service and the CPS community relations with local wholesalers. (III.R., 36, 56).

Even Frank-Lin, the only nonresident seller who shipped liquor directly to the CPS in violation of its nonresident seller's permit, was not certain whether its sales of generic brands of liquors were at the cheapest rates available to the NFI. (III.R., 109-11). In attacking the Texas gallonage tax in the name of cheapest prices, Respondent never refuted the facts that Texas wholesalers pay the tax, that the federal government holds no gallonage tax account with the State, and that the State collects no tax from NFIs on their liquor purchases from Texas wholesalers. (III.R., 149). Respondent further failed to refute and even admitted to the regulatory effectiveness of the Texas three-tier system (III.R., 176) which includes requirements of monthly shipment reports by nonresident sellers (III.R., 119, 153-4), the securing of label and content approval by nonresident sellers (III.R.,123,126,156), and beverage testing and analysis for purity, quantity, proof and identity in accordance with Texas standards (III.R., 164). Texas wholesalers are also required to file monthly reports with the State showing inventory information, including all imported alcoholic beverages. These reports are verified by comparing them with the reports of nonresident sellers and common carriers licensed by the Texas Alcoholic Beverage Commission (TABC).(III.R, 152, 155).

Holding that there was no apparent conflict between 32 C.F.R. § 261.4(c) and the Code "other than the conflict fabricated by the Plaintiff and its instrumentalities for the purposes of this suit", the District Court held for Petitioners, ruling that Respondent should secure the "most advantageous contract" within the confines of the Texas regulatory scheme. (App. C). Respondent pre-

sented no evidence regarding exclusive or concurrent jurisdiction at the Naval Station, and in fact admitted that the record "does not reflect whether the Navy's facilities in Texas are 'exclusive' or 'concurrent' jurisdiction bases" (Brief for Appellant, 29, ftn. 11). The Court of Appeals reversed, holding that, "The Twenty-first Amendment does not, indeed cannot, touch upon those circumstances or transactions where either the federal government occupies a zone of exclusive authority or state regulation significantly affects an area of federal concern beyond the Commerce Clause." (App. A).

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH SUPREME COURT DECISIONS WHICH WOULD UPHOLD THE CONSTITUTIONALITY OF THE TEXAS GALLONAGE TAX AS IT AFFECTS RESPONDENT.

Respondent blindly assails the presence of the Texas gallonage tax, § 201.03 of the Code, as it is incorporated into prices which Respondent pays to Texas wholesalers. While oblivious to taxes which a nonresident seller such as National Distillers would pass on to an NFI, Respondent seeks to preempt the exercise of the State's police powers over nonresident sellers and Texas wholesalers, by buying directly from nonresident sellers in the name of cheapest prices. This gallonage tax on wholesalers is the only factor averred by Respondent as precluding its goal of cheapest prices. The Court of Appeals has agreed with Respondent's purposes, basing its decision in part on *United States v. Tax Commission of Mississippi*, 421 U.S. 599 (1975) wherein this Court stated:

> When the case was last here we held that the Twenty-first Amendment confers no power on a State to regulate — whether by licensing, *taxation*, or otherwise — the importation of distilled spirits into territory over which the United States exer-

> cises exclusive jurisdiction [pursuant to Art. I, § 8, cl.17, of the Constitution]. 412 U.S., at 375; see *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938). Cf. *James v. Dravo Contracting Co.*, 302 U.S. 134, 140 (1937). We reach the same conclusion as to the concurrent jurisdiction bases to which Art. I, § 8, cl. 17, does not apply: 'Nothing in the language of the [Twenty-first] Amendment nor in its history leads to [the] extraordinary conclusion' that the Amendment abolished federal immunity *with respect to taxes* on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction. *Id.* at 613-4.(App. A). (Emphasis added).

However, unlike Mississippi, Petitioners do not seek to regulate the NFI's activities by taxing the federal government. In preempting Petitioners' regulation of nonresident sellers and Texas wholesalers by equating the Texas gallonage tax with the mark-up imposed by Mississippi on the federal government, the Court of Appeals created a conflict with decisions of this Court including, but not limited to, *Polar Ice Cream and Creamery Company v. Andrews*, 375 U.S. 361 (1964) and *United States v. County of Fresno*, 429 U.S. 452 (1977).

As this Court observed in *Tax Commission of Mississippi*, "Regulation 25 of the Tax Commission requires out-of-state liquor distillers and suppliers *to collect from military installations* within Mississippi, and *remit to the Commission*, a tax in the form of a wholesale mark-up of 17% to 20% on liquor *sold to the installations.*" 421 U.S. at 600. (Emphasis added). Therefore, based upon the evidence and language of Regulation 25, this Court was correct in readily concluding that the test of *First Agricultural National Bank v. Tax Comm'n*, 392 U.S. 339 (1968) showed that Regulation 25 unlawfully imposed the legal incidence of the tax on federal military bases. That test states: "where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls

upon the purchaser. That is plainly the requirement of Regulation 25." 421 U.S. at 608. Accordingly, the Court held that the Twenty-first Amendment did not abolish "federal immunity as respects taxes on sales to bases..." *Id.* at 614.

The Texas tax is completely unlike Mississippi's Regulation 25. Under § 201.03(a), "A tax is imposed on the first sale of distilled spirits at the rate of $2 per gallon." The effect of the Code's definition of "first sale" in § 201.02 is to impose § 201.03's tax on wholesalers on the basis of gallonage when a sale is made to the holder of a permit authorizing the retail sale of the beverage or to the holder of a local distributor's permit. See § 201.05 (App. G) which requires the wholesaler-permit holder to pay the liquor tax by the reporting system under bond. Raymond Hotaling, one of Respondent's witnesses, very accurately described the gallonage tax as an indirect tax on Respondent (III.R., 68-9) and further admitted that he had never seen an invoice for a purchase by an NFI from a Texas wholesaler which showed a direct tax being imposed on the NFI by the State. (III.R., 87). Moreover, Respondent maintains no gallonage tax account with the TABC; the TABC collects no tax from an NFI on its purchases from a wholesaler; and the TABC does not require the Texas wholesaler to add a tax to its selling prices.(III.R., 149).

Thus, the evidence showed the gallonage tax to be a valid state tax, not constitutionally repugnant, when measured by the standards set forth in *Polar Ice Cream, supra.* Polar challenged the Florida Milk Control Act which imposed a tax of 15/100 of 1 cent upon each gallon of milk distributed by a Florida distributor, arguing that such a tax was beyond Florida's jurisdiction because the computation of such tax included milk sold at federal enclaves over which the United States exercised exclusive jurisdiction. 375 U.S. at 381. In disagreeing with Polar, this Court did not rule on the basis of the exclusive or nonexclusive jurisdiction of the military bases which purchased milk from Polar. Instead, the

Court, in distinguishing *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) and *Standard Oil v. California*, 291 U.S. 242 (1934), based its decision on where the legal incidence of the tax fell, stating:

> In these cases the tax was deemed to fall upon the facilities of the United States or upon activities conducted within these facilities, the principle of both cases being that there was nothing occurring within the State, beyond the borders of the federal enclave, to which the tax could attach. Contrariwise, the Florida tax is on the privilege of engaging in the business of distributing milk or acting as a distributor; ...The incidence of the tax appears to be upon the activity of processing or bottling milk in a plant located within Florida, and not upon work performed on a federal enclave or upon the sale and delivery of milk occurring within the boundaries of federal property. *Standard Oil* and *Dravo* do not reach this case, for the activity Florida taxes — the processing or bottling of milk — occurs at Polar's plant prior to the sale and delivery of milk to the Government. 375 U.S. at 382.

The Texas gallonage tax is also paid by wholesalers prior to sale and delivery of such alcoholic beverages to NFIs.

In *United States v. County of Fresno, supra*, this Court considered a California property tax which two counties imposed on United States Forest Service employees who lived in federally owned houses in the national forests located in such counties. The federal employees attacked the tax as interfering with a federal function and thus forbidden under the Supremacy Clause of the United States Constitution 429 U.S. at 456. Citing "recent" decisions such as *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958) this Court noted:

> The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is

> imposed equally on the other similarly situated constituents of the State. 429 U.S. at 462.

Following this rule and holding against the federal employees, this Court concluded:

> The 'legal incidence' of the tax involved in this case falls neither on the Federal Government nor on federal property. The tax is imposed solely on private citizens who work for the Federal Government. The tax threatens to interfere with federal laws relating to the functions of the Forest Service *only* insofar as it may impose an economic burden on the Forest Service causing it to reimburse its employees for the taxes legally owed by them or, failing reimbursement, removing an advantage otherwise enjoyed by the Federal Government in the employment market...The tax can be invalidated, then, only if it discriminates against the Forest Service or other federal employees, which it does not do. *Id.* at 464. (Emphasis added).

There is no contention by Respondent that the Texas gallonage tax is discriminatory; indeed it is imposed on all wholesalers equally, whether they sell to NFIs or private retailers. The tax, like those in *Polar Ice Cream* and *County of Fresno*, is not imposed on the federal government. Respondent's attorney even conceded that the legal incidence of the tax is on the wholesaler." (III.R., 152).

Thus, Respondent can only complain that the gallonage tax imposes an economic burden which it does not want to bear. However, the fact that a Texas wholesaler may pass the gallonage tax to its purchasers as a cost of doing business does not violate federal immunity from state taxation. As this Court stated in *Alabama v. King & Boozer*, 314 U.S. 1 (1941):

> So far as such a nondiscriminatory state tax upon the contractor *enters into the cost of the materials to the Government, that is but a normal incident of the organization* within the same territory of the two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other

> does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. *Id.* at 8,9. (Emphasis added).

Cf. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

Consequently, the gallonage tax is not an unlawful attempt to regulate NFIs' activities regarding the importation of distilled spirits, and the constitutionality of the tax is firmly entrenched under the foregoing guidelines adopted by this Court. With no State licensing requirements being imposed on the NFIs, the only basis left for the Court of Appeals' decision is the exclusive nature of the Naval Station's jurisdiction. However, Respondent submitted no evidence on this issue, and the Court of Appeals further ignored this Court's relevant opinions dealing with the application of the Supremacy Clause to Twenty-first Amendment cases.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE OPINION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH RULINGS OF THE SUPREME COURT DEALING WITH EXCLUSIVE JURISDICTION AND WITH THE SUPREMACY CLAUSE AS IT APPLIES TO TWENTY—FIRST AMENDMENT CASES.

The gut issue in this section of the Petition is: In light of the facts that (1) the Texas gallonage tax is not imposed on Respondent, that (2) Petitioners require no licenses or permits from Respondent, and that (3) Respondent did not plead (I.R., 1-5) or prove facts relating to the issue of exclusive or concurrent jurisdiction, must Petitioners' regulation of nonresident sellers and Texas wholesalers be preempted by Respondent's desire to obtain liquor at the cheapest prices when the language of 32 C.F.R. § 261.4(c) reflects no clear Congressional directive to do so?

The Court of Appeals began to address the Supremacy Clause issue, noting:

> It is beyond peradventure that the Supremacy Clause of the United States Constitution is implicated only where Congress exercises a granted power. See U.S. Const. amend. X. Within these limited contours federal law will preempt the operation of any corresponding state legislation where there is an *actual conflict* between the two sets of legislation such that both cannot stand. *See Williams, supra.* (App. A)(Emphasis added).

The Court of Appeals never identified the actual conflict between Texas law and 32 C.F.R. § 261.4(c), and also failed to apply the reasoning in *Rice v. Norman Williams Co.*, _____U.S._____, 102 S.Ct. 3294, (1982) that when inquiring "whether there exists an irreconcilable conflict between the federal and state regulatory schemes, [the] existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute."*Id.* at 3299.

In abandoning the Supremacy Clause test set forth in *Rice*, the Court of Appeals instead abruptly decrees in the section of its opinion entitled, "EXCLUSIVE ZONE OF FEDERAL JURISDICTION", that the Twenty-first Amendment cannot touch transactions where the federal government occupies a zone of exclusive authority or where the state has significantly affected an area of federal concern beyond the Commerce Clause. (App. A). If the Court means by a "zone of exclusive authority" that Respondent had exclusive jurisdiction over the Naval Station, then the Court based its opinion on an issue totally void of any proof in the record.

In support of its opinion, the Court of Appeals cites *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) and *United States v. Tax Commission of Mississippi*, 412 U.S. 363 (1973). In *Collins* this Court held that where the United States exercised exclusive jurisdiction in Yosemite National Park, California's Alcoholic Beverage Control Act could not apply within the Park, and the Park could not be obligated to apply for permits for importation and sale of alcoholic

beverages within the Park. Unlike the facts in *Collins*, Petitioners do not seek to apply the Code within the Naval Station nor require the CPS to apply for any types of permits from the TABC. With regard to exclusive jurisdiction, this Court noted in *Collins:* "By the Act of March 3, 1905,...California ceded and granted the United States title to the 'Cleft' or 'Gorge', known as Yosemite Valley and the Mariposa Big Tree Grove...By the Act of June 11, 1906,...Congress accepted the cession and made lands conveyed a part of the Yosemite National Park." 304 U.S. at 527. Cf. *Id.* at 523-6. There was no similar proof or pleading by Respondent regarding cession by Texas to the United States.

In *United States v. Tax Commission of Mississippi, supra*, this Court observed: "*The complaint* contended that the Regulation was invalid because it constituted an attempt by the State to legislate with respect to military facilities and territory over which the Congress has *exclusive legislative authority.*" 412 U.S. at 367. (Emphasis added). This Court further noted, "The District Court agreed that the United States had exclusive jurisdiction over two of the four bases and concurrent jurisdiction over the remaining two." *Id.* See footnote 2 in *United States v. Tax Commission of Mississippi*, 421 U.S. at 601, which sets out bases of exclusive federal jurisdiction over Keesler Air Force Base and the Naval Construction Battalion Center. Cf. *Pacific Coast Dairy, Inc. v. Dept. of Agriculture*, 318 U.S. 285 (1943) wherein this Court wrote: "Moffett Field was acquired by the United States under an Act of Congress, and it is conceded that it has always been under the exclusive jurisdiction of the federal government." *Id.* at 293. This Court expanded on this issue in footnote 7: "The appellant and the government treat this *allegation as conclusive, since it was not denied by appellees. Nothing turns, in our view, on the method of acquisition."Id.* In the instant suit Petitioners do not concede that the Naval Station is under Respondent's exclusive jurisdiction. Petitioners did not have the oppor-

tunity at the trial level to concede or deny facts regarding this issue because Respondent made *no allegations* concerning exclusive or concurrent jurisdiction.

In effect the Court of Appeals retried Respondent's case based on facts and issues not before the trial court and thus not subject to contest by Petitioners. In so doing, the Court of Appeals ignored its own ruling in *Lafayette Royale Apartments, Inc. v. Meadow Brook National Bank*, 397 F.2d 378 (5th Cir. 1968) wherein an issue was not considered because "it was not raised in the pleadings or presented to the court below and, therefore, is not entitled to consideration by us on appeal." *Id.* at 381, ftn. 3. In *Leizerowski v. Eastern Freightways, Inc.*, 514 F.2d 487 (3rd Cir. 1975) the Court held that a theory of recovery not presented in the district court is not properly before a court of appeals. Cf. *Wolf v. Frank*, 477 F.2d 467 (5th Cir. 1973), *cert. denied*, 414 U.S. 975. In *United States ex rel. Huisinga v. Commanding Officer*, 446 F.2d 124, 125 (8th Cir. 1971) the Court followed these same rules and applied them to the federal government.

In focusing on the unplead issue of exclusive jurisdiction, the Court of Appeals overlooked critical language in *United States v. Tax Commission of Mississippi*, 412 U.S. 363 (1973) which supports Petitioners' position in continuing their regulation of nonresident sellers and Texas wholesalers without regard to the type of jurisdiction maintained at the Naval Station. In *Tax Commission of Mississippi, supra*, this Court stated (412 U.S. at 371):

> The transactions here at issue are strictly between the United States and out-of-state distillers and suppliers. The goods are ordered by the officers' clubs and other nonappropriated fund activities and then delivered within the military bases over which the United States claims exclusive jurisdiction. Thus, with respect to the initial sale and delivery of the liquor by the suppliers to military facilities located in exclusively federal enclaves, nothing oc-

> curs within the State that gives it jurisdiction to regulate the initial wholesale transaction. Cf. *Polar Ice Cream & Creamery Co., v. Andrews*, 375 U.S. 361, 382-383 (1964); *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261 (1943).

This Court added in ftn. 13: "The State's power to regulate transportation of alcoholic beverages *through its territory to the bases or from the bases back into its jurisdiction is, however, a different question...*" *Id.* (Emphasis added). The Court further explained (412 U.S. 377-8):

> This is not to suggest that the State is without authority either to regulate liquor shipments destined for the bases while such shipments are passing through Mississippi or to regulate the transportation of liquor off the bases and into Mississippi for consumption there. Thus, while it may be true that the mere shipment [of liquor] through a state is not transportation or importation into the state within the meaning of the [Twenty-first] Amendment, *Carter v. Virginia*, 321 U.S. 131, 137 (1944), a State may, in the absence of conflicting federal regulation, properly exercise its police powers to regulate and control such shipments during their passage through its territory insofar as necessary to prevent the unlawful diversion of liquor into the internal commerce of the State, see *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S., at 333, 331 n. 10; *Carter v. Virginia, supra; Duckworth v. Arkansas*, 314 U.S. 390 (1941). And the State, of course remains free to regulate or restrict, under § 2 of the Twenty-first Amendment, the transportation off the two bases of liquor that has been purchased and is in fact destined for use, distribution, or consumption within its borders, see *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S., at 42; see also *California v. LaRue*, 409 U.S. 109, 114 (1972).

As J. Frankfurter stated simply in his concurring opinion in *Carter v. Virginia:*

> The Twenty-first Amendment prohibits the transportation or importation into any State...of intoxicating liquors, in violation of the laws thereof not when the liquor is for delivery *and* use but for 'delivery *or* use therein.' In other words, liquor need not be intended for consumption in a State to be deemed imported into the State and therefore subject to control by that State. 321 U.S. at 141.

The Court of Appeals recognized a state's police power to regulate the passage of liquor through its territory stating, "This is not to say that a state may not institute measures designed to prevent the unlawful diversion of alcohol destined for a federal enclave into the state's stream of commerce." 695 F.2d at 142. (App. A). However, the Court of Appeals did not allow Petitioners to enforce measures such as §§ 19.01 and 37.01 of the Code which prevent such "unlawful diversion", concluding that, "Like the mark-up in *Tax Commission*, there is no indication here that the Texas law under examination 'is an effort to deal with problems of diversion of liquor from out-of-state shipments destined for...the bases.'" *Id.* at 142. (App. A).

It is certainly ironic and even more unfortunate for Petitioners that the Court, while osmotically creating evidence on the issue of exclusive jurisdiction, completely ignored the abundant evidence in the record relating to Petitioners' regulatory enforcement measures designed to prevent the introduction of illicit beverages into the commerce of the State. It is impossible to read the record and render an assessment of §§ 19.01 and 37.01 and the precautionary measures taken by the TABC as not being efforts to deal with possible diversion of liquor through the State. As the following case law will demonstrate, there is no conflicting federal regulation at issue which preempts Petitioners' police powers in regulating nonresident sellers and Texas wholesalers.

Heublein, Inc. v. South Carolina Tax Commission, 409 U.S. 275 (1972) presents the proper analysis of state and federal policy applicable to liquor regulation and supports Petitioners' regulatory posture. *Heublein* con-

cerned a federal statute, 15 U.S.C. § 381(a), which provided that no State could impose a net income tax on income derived within the state from interstate commerce if the only business activities within the State were either, or both, of the following: (1) the solicitation of orders for sales of tangible personal property, when the orders were sent outside the State and filled by shipment or delivery from a point outside the State; and (2) the solicitation of orders in the name of or for the benefit of a prospective customer if those orders by the customer enabled such customer to fill orders resulting from such solicitation and were orders described in paragraph (1). 409 U.S. at 276.

Under South Carolina's Beverage Control Act, S.C. Code Ann. § 4-1, *et seq.*:

> [Only] registered producers of registered brands of alcoholic beverages may ship those brands of alcoholic beverages into the State...Such producers must have a resident representative who has no direct or indirect interest in a local liquor business...Shipments of liquor into the state may be made only to the producer in care of its representative...Prior to the shipment, the producer must mail a copy of the invoice showing the quantity and price of the items shipped, and a copy of the bill of lading to the Alcoholic Beverage Control Commission...When received, the shipment must be stored in a licensed warehouse of the producer, or, after delivery is complete, the shipment may be transferred to a licensed wholesaler...Heublein complied with this regulatory scheme. *Id.* at 278.

Although Heublein exceeded the solicitation limits set out in § 381(a), Heublein argued that it transferred its products to its local representative who in turn transferred them to a local wholesaler only because South Carolina required such an operation as a condition of conducting business in the State. *Id.* at 279. Heublein further argued that South Carolina "may not evade the purpose of § 381(a) by requiring a firm to do more than solicit business within the state and then taxing the firm for engaging in this compelled additional activity." *Id.*

However, the Court did not agree with Heublein's theory that the federal statute was meant to prohibit a state's regulatory scheme such as South Carolina's regulation of nonresident sellers, noting that:

> Such a reading would require us to assume that Congress carefully considered the difficult problems of accomodating the federal interest in an open national economy with local interest in regulating the sale of liquor. The evidence is clear that Congress did not do so. *Id.*

This Court added:

> [Congress] did not address the questions raised by a requirement, incident to a valid regulatory scheme, that a business undertake activities above the limit as a condition of doing business with the State.
>
> Congress recognized, instead, that *the accomodation of local and national interests* in this area was a delicate matter. *Id.* at 281. (Emphasis added).

The Court further explained that Congress, in enacting § 381(a), was not addressing the taxation of a business when it was in compliance with the valid state regulatory scheme, emphatically asserting:

> Congress, then did not address in § 381 the problem of taxing a business when it undertook local activities simply in order to comply with the requirements of a valid regulatory scheme. *Such regulation is an important function of local governments in our federal scheme.* As we said last Term, *unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. United States v. Bass.* 404 U.S. 336, 349 (1971).
>
> Congress of course did not enact in § 381 a statute which a State can deliberately evade by requiring a firm to undertake more than mere solicitation. When a State enacts a regulatory scheme that serves legitimate State purposes other than assuring that the state may tax the firm's income, it is not evading § 381; *it is pursuing permissible ends in a manner that Congress did not address.* Thus, if

> South Carolina's system of regulating the sale of liquor is valid, § 381 does not prohibit taxation of Heublein's local *sales*. *Id.* at 281-2. (Emphasis added).

The evidence in this case established that Petitioners' regulatory scheme in §§ 19.01 and 37.01 of the Code serves legitimate State purposes other than assuring that the gallonage tax will be paid by Texas wholesalers. Under this scheme nonresident sellers are required to file monthly reports reflecting their shipments of liquor into the State. (III.R., 119). See similar South Carolina requirements, 409 U.S. at 277-8. Charles Hare, Director of Auditing for the TABC, testified that this monthly report was the manner through which he first became aware of Frank-Lin's unlawful, direct shipment of liquor to the Naval Station (III.R., 119), and but for the requirement of this report, he may never have become aware of Frank-Lin's shipment into Texas. (III.R., 125). Also, contrary to testimony that Frank-Lin had obtained label and sample approvals for liquor it shipped to the CPS on May 29, 1981 (III.R., 102), Mr. Hare testified that as of June 5, 1981, the TABC had *not* given label and content or sample approval to that liquor shipped by Frank-Lin. (III.R., 123). The absence of this label and content approval is very critical to Petitioners' regulation of nonresident sellers because as Mr. Francke testified, military servicemen from the Naval Station were allowed to take alcoholic beverages purchased from the CPS off the base and into the town of Beeville, Texas. (III.R., 54). With unapproved beverages such as Frank-Lin's not being submitted for testing and approval, any future transportation of such illicit liquor into Petitioners' jurisdiction could endanger the health and safety of Texas residents. (III.R., 165-7). It is unquestioned that a state has valid regulatory and police powers to protect its citizens from the sale, transportation or consumption of illicit or unapproved alcoholic beverages. *Craig v. Boren*, 429 U.S. 190 (1976); *California v. LaRue*, 409 U.S. 109 (1972); and *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).

Contrary to the Court of Appeals' conclusion regarding the purpose of the Texas regulatory laws at issue, the foregoing evidence conclusively demonstrates that the Texas law "is an effort to deal with problems of diversion of liquor from out-of-state shipments destined" for military bases in Texas. Cf. *Tax Commission of Mississippi*, 412 U.S. at 378; Cf. *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 325 (1964) wherein the liquor involved was transferred directly to departing aircraft on documents approved by United States Customs and was not delivered to the customer until he arrived at his foreign destination. With no chance of unlawful diversion of the liquor, this Court deemed the sale of liquor as not within the New York statute's purview. This Court noted: "The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State." *Id.* at 333. Realistically a state is in a much different territorial and regulatory posture with a foreign country (as in New York's case) than with a military base located within the State's boundaries (as in Texas' case), and the dangers of unlawful diversion are much greater in the latter situation.

This Court's analysis of § 381(a) in *Heublein* applies to 32 C.F.R. § 261.4(c) and should lead to the same conclusion that Petitioners' regulatory law is not preempted by a federal law which only appears to be conflicting. Regulation 32 C.F.R. § 261.4(c) was promulgated pursuant to 50 U.S.C. App. § 473, a part of the Universal Military Training and Service Act which was enacted in 1951. Section 473 (App. F) states in pertinent part:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the *sale*, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors *to or by members of the Armed Forces* or the National Security Training Corps *at or near any camp*, station, post, or other place primarily oc-

> cupied by members of the Armed Forces or the National Security Training Corps....June 19, 1951, c. 144, Title I, § 6, 65 Stat. 88. (Emphasis added).

As § 473 indicates, it was concerned with the sale of alcoholic beverages "at or near any camp..." Although Congress could have done so, nowhere does § 473 or any other provision of the Universal Military Training and Service Act, set out fully in 1951 U.S. Code Cong. & Admin. Service, vol. 1, 73-86, express even a remote concern with the procurement of alcoholic beverages by NFIs from nonresident sellers. In fact, §§ 19.01 and 37.01 of the Code were enacted in 1949 and 1943, respectively, so Congress could have addressed any problem with state regulation of nonresident sellers or wholesalers in relation to the military.[2] But just as this Court in *Heublein* studied § 381(a)'s relationship with South Carolina's alcoholic beverage regulation and noted that Congress did not address that problem, Congress also did not address Texas' alcoholic beverage regulation when the Military Training Act was passed. Congress conveyed no clear purpose to inhibit or totally preempt Texas' regulation of nonresident sellers and Texas wholesalers in favor of procurement activities by military NFIs. As this Court advised, regarding unclear expressions of Congressional intent, in *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 275 (1943):

> An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication,...should be at least as persuasive

2. §§ 191.01 and 37.01 are a part of a recodification in 1977 of the Texas Liquor Control Act (Arts. 666-1 through 667-33, Vernon's Texas Penal Auxiliary Laws. § 19.01 was previously Art. 666-15-(6), V.A.P.C., 1949, 51st RS, HB 84 ch. 543, sec. 5, p. 1018; § 37.01 was previously Art. 666-15 ½, V.A.P.C., 1943, 48th R.S., SB 117, ch. 325, sec. 15, p. 523.

when the question is on the nullification of state power by Congressional legislation.

Nothing in the Military Training Act authorizes the Department of Defense to proceed from the limited language of § 473's "at or near any camp" to Respondent's broad interpretation of § 261.4(c) which would purportedly allow an NFI to purchase liquor from suppliers situated thousands of miles outside the state. Contrary to this unduly broad interpretation of § 261.4(c), this Court in *Heublein* adopted a course of "accomodation of local and national interests in this area". 409 U.S. at 281. In order to salvage the constitutionality of the federal regulation, this same policy of local and national accomodation can also be effected under § 261.4(c)'s express terms. The very beginning of that regulation provides: "DOD will cooperate with all duly constituted regulatory officials (local, State and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part." Having never identified the actual conflict between § 261.4(c) and §§ 19.01 and 37.01, Respondent also never offered any plausible explanation why NFIs cannot both cooperate with Texas' regulation of nonresident sellers and wholesalers and, subject to such regulation, attempt to gain its most advantageous contract in procuring alcoholic beverages for its NFIs. This Court's definition of "conflict" in *Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966) as existing "when one law affirmatively requires one to violate the other law," [Cf. *Wine Industry of Florida, Inc. v. Miller*, 609 F.2d 1167, 1171 (5th Cir. 1980)] supports this spirit of cooperation and co-existence between state and federal law. Under the *Hostetter* definition of "conflict", §§ 19.01 and 37.01 of the Code do not affirmatively require the violation of 32 C.F.R. § 261.4(c), and the reverse is true also.

This Court described South Carolina's scheme thusly:

> South Carolina's Alcoholic Beverage Control Act is a long and detailed statute. Requirements that certain records be kept by the manufacturer, the

> wholesaler, and the retailer pervade the scheme. There must be complete records of the quantities, brands, and prices involved at every stage of each liquor sale. By requiring manufacturers to localize their sales, South Carolina establishes a check on the accuracy of these records...*The requirement that sales be localized is, unquestionably, reasonably related to the State's purposes and is not simply an attempt by the State to provide a basis for the taxation of an out-of-state seller's local sales.* 409 U.S. at 282-3. (Emphasis added).

Petitioners showed at trial that by their use of monthly reports and by localizing nonresident sellers' sales to Texas wholesalers, the TABC is able to verify the accuracy of both sellers' records and is also able to track the flow of liquor into the State. (III.R., 151, 154-5). The Texas Alcoholic Beverage Code, like South Carolina's Liquor Code, is a long and detailed statute reasonably and expressly related to the State's purposes under the Twenty-first Amendment. The express terms of §§ 19.01 and 37.01 are reasonably related to these purposes and, in comparison with the provisions of the Universal Military Training and Service Act, Petitioners' regulation of nonresident sellers and Texas wholesalers is not an attempt by Texas to provide a basis for controlling an NFI's procurement practices.

In *Heublein* § 381(a) was held inapplicable to South Carolina's treatment of nonresident manufacturers. 409 U.S. at 284. The Supreme Court allowed both the South Carolina statutes and § 381(a) to stand, with the federal law not adjudged unconstitutional under the Twenty-first Amendment. This same treatment should be accorded 32 C.F.R., § 261.4(c) in light of the valid regulatory scheme contained in the Code. No conflict exists between this federal regulation and §§ 19.01 and 37.01 of the Code, except the conflict which has been artificially created by Respondent's attempt to make "advantageous contract" synonymous with cheapest prices.

The Court of Appeals, instead of following the *Heublein* analysis of state and federal law which seeks to accomodate both interests, chose to create a direct conflict between state and federal law in holding that, "the federal government, as a sovereign and absent a voluntary relinquishment of its sovereign rights, exercises exclusive jurisdiction over federal enclaves." 695 F.2d at 142 (App. A). In basing its decision on an issue devoid of any evidence and failing to identify the sovereign rights which Respondent supposedly relinquished involuntarily, the Court of Appeals erred further in ignoring this Court's admonition in *Rice v. Norman Williams Co.*, _____U.S._____, 102 S.Ct. 3294, 3301 (1982):

> One might be able to hypothesize an arrangement enforced by the designation statute that might be prohibited by § 5(a), but this is insufficient to invalidate a State statute pursuant to the Supremacy Clause. 'To hold otherwise would be to ignore the teaching of this Court's decisions which *enjoin seeking out conflicts between state and federal regulation where none clearly exists.*' *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446, 80 S.Ct. 813, 817, 4 L.Ed.2d 852 (1960).(Emphasis added).

The legislative history of the Military Training Act like that of § 381 in *Heublein* "shows that Congress had rather limited purposes which are not evaded by [Texas'] regulation of liquor sales [and shipments] in the manner it has chosen. Congress did not focus on the consequences of its actions for such local regulatory schemes." See 409 U.S. at 279.

The Military Training Act did not intend to affect state laws regarding the regulation of nonresident sellers and wholesalers. House Report No. 271, 1951 U.S. Code Cong. & Admin. Service, vol. 2, 1472, reflects the purposes of the Act as: (1) enabling the armed services to immediately raise and maintain an armed force of sufficient size, as determined by the Joint Chiefs of Staff to meet our minimum security requirements and

(2) establishing a universal military training program. There is no stated purpose regarding the procurement of alcoholic beverages by any military installation in violation of state law. 50 U.S.C. App. § 473, when read in conjunction with other provisions of the Military Training Act, shows that § 473 applied only to the control of soldiers' activities with regard to alcoholic beverages at or near a military installation. There is no language in the Act which would support Respondent's characterization of 32 C.F.R. § 261.4(c) as a regulation which requires NFIs to buy alcoholic beverages at the cheapest prices in contravention of state alcoholic beverage regulatory law.

In *Penn Dairies v. Milk Control Commission, supra*, this Court considered a Pennsylvania law regulating minimum milk prices which was assailed as invalid under the Supremacy Clause in the face of federal laws which required competitive bidding in the purchase of supplies for the Army and acceptance of the lowest responsible bid. The Court nonetheless did not focus on the apparent facial conflict between federal and state law. Instead, the Court observed:

> Nor are we able to discern, in the language or legislative history of these or related statutes regulating government contracts, any indication that low cost was such a controlling consideration with Congress as to justify an inference that Congress intended to displace state regulation affecting the price of articles purchased by the government. 318 U.S. at 273.

National Railroad Passenger Corporation v. Miller, 358 F. Supp. 1321 (1973), *aff'd without written opinion*, 414 U.S. 948, concerned the application of Kansas liquor laws to the service of alcoholic beverages on Amtrak's trains as they passed through Kansas. Kansas law allowed no open saloons, required a tax or duty on liquor brought into the state, required a mark or stamp on each package of liquor, required labeling or a gauging fee,

tax, duty or license on liquor transported in Kansas and required any person selling liquor in the state to have a valid license from the state. 358 F.Supp. at 1323-4. Employees on board an Amtrak train were stopped and arrested by Kansas Alcoholic Beverage Control Officials for violating these laws when they transported, sold or served alcoholic beverages on the train within Kansas. Like Respondent herein, the plaintiff in *National Railroad* relied on the Supremacy Clause, urging that Kansas statutes conflicted with and were inferior to the Rail Passenger Act, 45 U.S.C. § 546(c), which states:

> The Corporation shall not be subject to any State or other law pertaining to the transportation of passengers by railroad as it relates to rates, routes, or service. 358 F. Supp. at 1328.

The plaintiff argued that the word "service" in § 546(c) included the service of alcoholic beverages. The District Court disagreed, however, observing that:

> Under the language of Section 2 of the Twenty-first Amendment, as such provision is interpreted by the United States Supreme Court in its application to state liquor laws, we are compelled to reach the conclusion that the plaintiff was and is subject to the laws of Kansas which control the importation and possession for delivery or use of liquor in the state. *Id.* at 1328.

The District Court did not inquire whether the federal government exercised exclusive or concurrent jurisdiction over alcoholic beverage activities on board an Amtrak train. Instead, regarding the plaintiff's preemption argument, the Court added:

> But before a federal law may preempt state legislation, the federal statute must be free from constitutional infirmity. Constitutional amendments limit the power of Congress as well as that of the states when so considered. A construction of 45 U.S.C. § 546(c) which would forbid or prevent the enforcement of a state's regulatory liquor law under the guise of classifying the use and sale of liquor-by-the-drink as a 'service,' if so construed, *would*

> *amount to a circumvention of the clear provisions of the second section of the Twenty-first Amendment. There is nothing in the legislative history of the amendment, nor in the enactment of the Rail Passenger Service Act, to justify such interpretation and such an effort, had it been attempted, would be a clear violation of the Twenty-first Amendment. A statute will not be given a broad construction if its validity can be saved by a narrower one. United States v. Walter*, 263 U.S. 15, 44 S.Ct. 10. 358 F. supp. at 1329. (Emphasis added).

Thus, the word "services" was deemed not to include the service of liquor in violation of Kansas liquor laws, with the federal law being held valid and constitutional without preempting the Kansas Liquor Control Act. Under the *National Railroad* analysis a construction of "advantageous contract" in 32 C.F.R. § 261.4(c) as requiring the preemption of Texas' regulation of nonresident sellers and wholesalers would also amount to the circumvention of the Twenty-first Amendment. The validity of § 261.4(c) can be saved by giving it the narrower construction of allowing Respondent to obtain its most advantageous contracts from Texas wholesalers.

Just as the Court in *Heublein, supra*, considered the legislative history of the federal statute at issue therein, the court in *National Railroad* reviewed the legislative history of the Rail Passenger Act which revealed that the Act had no purpose in preempting Kansas' liquor laws. Following this line of legislative analysis, Petitioners have shown that the legislative history of the Universal Military Training and Service Act contained no intent, purpose or plan to erode the Texas regulatory scheme with regard to nonresident sellers and wholesalers of alcoholic beverages.

Consistent with the holdings in *Heublein* and *National Railroad*, the Court of Appeals in *Castlewood International Corp. v. Simon*, 596 F.2d 638 (5th Cir. 1979), judgment vacated, 446 U.S. 949 (1980), on remand, 626 F.2d 1200 (5th Cir. 1980), upheld a Florida statute regarding

wholesalers' trade discounts to vendors. The Florida statute was challenged under the Supremacy Clause by ATF Rule 74-6 of the Bureau of Alcohol, Tobacco and Firearms which allowed wholesalers' trade discounts only if the price charged was not less than the wholesaler's laid-in cost plus total operation cost. 596 F.2d at 640, 643. In upholding the Florida statute the Court of Appeals observed that the Twenty-first Amendment...

> is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product-intoxicating liquors. *Id.* at 642.

Because of this express grant of power to the states the Court of Appeals followed this rule in evaluating a state's alcoholic beverage regulatory scheme when attacked by some federal policy:

> Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a *vantage point of presumed state power* and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, *great deference must be accorded a comprehensive state regulatory scheme. Id.* (Emphasis added).

In *United States v. State of Texas*, 695 F.2d 136 (5th Cir. 1983), the Court of Appeals lists four "primary considerations to be weighed" in the balancing of state and federal interests to determine the applicable law, the first three of which are: "(1) the pervasiveness of the federal regulatory scheme, (2) whether federal occupation of the field is necessitated by a need for national uniformity, [and] (3) the danger of conflict between state laws and the administration of federal programs." *Id.* at 139. (App. A). If the Court of Appeals had referred to its opinion in *Castlewood* it would have known that in the area of the Twenty-first Amendment, these considerations were answered in favor of state regulation by the

very passage of the Amendment. In *Castlewood* the Court stated:

> As originally proposed, the Amendment contained three substantive sections, the third of which provided:
>
> > Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.
>
> 76 Cong. Rec. 4138 (1933). Section Three was deleted because of Congressional concern that its grant of concurrent power to regulate liquor to Congress would be construed to support the supremacy of federal regulation of liquor sales. As Senator Wagner pointed out, 'We have expelled the system of national control through the front door...and readmitted it forthwith through the back door of Section 3.' 76 Cong. Rec. 4145 (1933). This would have been the 'ironical result of an amendment designed to restore to the states control of their liquor problem.' *Id.* With these concerns in mind, Section Three was deleted in the final version of the amendment. 596 F.2d at 642.

Thus, it should have been obvious to the Court of Appeals in the instant case that unless there was a conflicting federal regulation, the express intent of Congress in passing the Twenty-first Amendment was to make the states supreme in exercising police powers to regulate the flow of liquor through their borders.

The fourth primary consideration alluded to by the Court of Appeals, "Whether the state regulation infringes upon individual constitutional guarantees," 695 F.2d at 139 (App. A) was also addressed in *Castlewood* wherein the Court noted:

> Federal laws have prevailed over state regulation of intoxicating liquors in only two circumstances: (1) where the state regulation was repugnant to overriding national concern with due process and equal protection, and (2) where the state has sought to invade an area of exclusive federal concern, such as federally owned installations... 596 F.2d at 643.

The intent of those who framed the Twenty-first Amendment to grant the states control or supremacy in the regulation of liquor and Respondent's lack of pleadings and proof on the issue of exclusive jurisdiction buttress Petitioners' assertion that in regulating nonresident sellers and Texas wholesalers under the Code, Texas has not sought to invade an area of exclusive federal concern.

Without regard to the type of jurisdiction exercised by Respondent at the Naval Station, Respondent sued Petitioners simply to buy its liquor free of state taxation and without having to obtain any state permits, i.e. Respondent wanted to avoid the Texas wholesaler in its liquor transactions and also wanted to detour around Texas regulation of those wholesalers and nonresident sellers, all in the name of buying liquor at the cheapest prices. In neither the Military Training Act nor 32 C.F.R. § 261.4(c) has Respondent identified an actual conflict with Texas law or a clear Congressional intent to preempt Texas' valid liquor regulation under the Twenty-first Amendment. The Court of Appeals erred in its refusal or failure to so analyze and balance the state-federal interests involved which should result in a decision that Petitioners' regulation of Texas wholesalers and nonresident sellers preempts Respondent's attempt to inhibit or destroy such regulation under the facade of 32 C.F.R. § 261.4(c)'s cheapest prices.

In *Penn Dairies v. Milk Control Commission, supra*, this Court cogently summed up similar federal considerations advanced by Respondent in this cause:

> We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Met-*

calf & Eddy v. Mitchell, supra, 269 U.S. at page 523, 524, 46 S.Ct. at page 174, 70 L.Ed. 384. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system... 318 U.S. at 270-1.

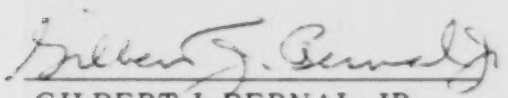
CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JIM MATTOX
Attorney General
of the State of Texas

DAVID R. RICHARDS
Executive Assistant



GILBERT J. BERNAL, JR.
Assistant Attorney General
Chief, Taxation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4721

Attorneys for Petitioners, the State of Texas, Texas Alcoholic Beverage Commission and W.S. McBeath, Administrator of the Texas Alcoholic Beverage Commission

PROOF OF SERVICE

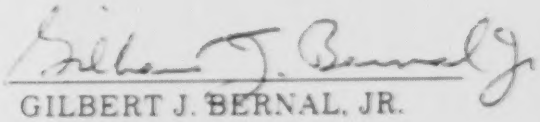
I hereby certify that I am a member of the Bar of the United States Supreme Court, and that on this 7 day of June, 1983, three copies of Petitioners' Petition for Writ of Certiorari have been served on all parties required to be served by United States mail, first class postage prepaid, addressed as follows:

Mrs. Mary Joe Carroll
CLARK, THOMAS, WINTERS & SHAPIRO
P.O. Box 1148
Austin, Texas 78767

Mr. Michael L. Paup
Mr. Steven I. Frahm
Attorneys, Tax Division
Department of Justice
Washington, D.C. 20530

Mr. Edward C. Prado
United States Attorney
655 E. Durango Blvd.
San Antonio, Texas 78206

Solicitor General
Department of Justice
Washington, D.C. 20530



GILBERT J. BERNAL, JR.
Assistant Attorney General
Chief, Taxation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4721

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 81-1597

D.C. Docket No. A-79-CA-79

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

THE STATE OF TEXAS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before BROWN, GEE and JOLLY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

January 10, 1983

ISSUE AS MANDATE:

CORRECTED

UNITED STATES OF America,
Plaintiff-Appellant,

v.

The STATE OF TEXAS, Texas Alcoholic Beverage Commission and W.S. McBeath, as Administrator of the Texas Alcoholic Beverage Commission,
Defendants-Appellees.

No. 81-1597.

United States Court of Appeals,
Fifth Circuit.

Jan. 10, 1983.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, GEE and JOLLY, Circuit Judges.

GEE, Circuit Judge:

INTRODUCTION.

The Texas Alcoholic Beverage Code incorporates a three tiered regulatory scheme embracing (1) nonresident sellers, (2) resident wholesalers and (3) resident retailers of distilled alcoholic beverages. Each is required to obtain a permit for the activity to be conducted. Tex.Alco.Bev.Code Ann., § 11.01(a) (Vernon 1978). Nonresident sellers may sell only to wholesale permit holders authorized to import alcoholic beverages into Texas. *Id.* §§ 19.01, 20.01, 37.01. In turn these wholesale permit holders sell to resident retailers,

designated under the code as package store permit holders. *Id.* § 22.01. In addition to this tiered regulatory scheme, the code requires wholesale permit holders to pay a tax of $2 for each gallon of distilled spirits sold.[1] *Id.* § 201.03(a).

At some point during the winter of 1978, several nonappropriated fund instrumentalities[2] (NFIs) of the Department of the Navy concluded that the Department of Defense's alcohol procurement regulation, 32 C.F.R. § 261.4(c)[3], permitted the importation of alcoholic beverages directly from nonresident sellers, notwithstanding their designation as package store permit holders under the code. The Texas Alcoholic Beverage Commission (TABC) disagreed with this reading of section 261.4(c) and expressly forbade nonresident sellers from selling directly to the NFIs.

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1. The State of Texas argues vigorously that its gallonage tax falls upon the wholesaler and not the government, and that the gallonage tax is a method of defraying the costs of regulation rather than producing revenue. Because our analysis turns on the proposition that the state may not, in any manner, regulate the distribution or consumption of alcoholic beverages on a federal enclave in the absence of an agreement between it and the federal government, we find no need to pass upon the validity of these arguments.

2. A nonappropriated fund instrumentality is not supported by direct government funding. NFIs are expected to support military recreational activities through the generation of profits, by virtue of the sale of alcoholic beverages or otherwise. The NFIs in question are located at the Navy's air stations in Corpus Christi, Kingsville and Beeville, Texas.

3. In pertinent part, 32 C.F.R. § 261.4(c) provides:

(1) DOD will cooperate with all duly constituted regulatory officials (local, State and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price, and other factors considered.

In a bulletin sent to all wholesalers and nonresident sellers on January 30, 1978, the TABC warned of its readiness to take legal action to prevent circumvention of the gallonage tax on the military's procurement of alcoholic beverages. A similar bulletin was issued on July 10, 1978, indicating that any attempts by nonresident sellers to avoid the gallonage tax by delivering direct orders to the military would be vigorously challenged. In particular the bulletin noted that "any deliberate violation of the law is unquestionably a ground for cancellation of permits."[4] On this same date the TABC initiated proceedings against Frank-Lin Distillers of San Jose, California, for the "unauthorized" delivery of alcoholic beverages to an NFI located at Chase Field, Beeville, Texas.[5]

On April 23, 1979, the United States instituted suit in the Western District of Texas seeking a declaratory

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4. The bulletin, dated July 10, 1978, in its entirety reads as follows:

On January 30, 1978, this agency issued a statement with regard to its position on sales to military installations. At that time it was anticipated that an attempt might be made by one or more purchasers for a military instrumentality to avoid the Texas gallonage tax by some sort of direct order to a wholesaler or non-resident seller. Information received indirectly indicates that such an attempt will be made within the near future.

The purpose of this letter is to remind you that the Alcoholic Beverage Commission will vigorously challenge any attempt to circumvent the Texas gallonage tax. The statutory law of Texas is entirely different and distinguishable from the controlling provisions in Mississippi and Louisiana where the courts have authorized tax-free sales to the military. This agency is bound and controlled solely by the laws of the State of Texas which it has the duty to enforce. Any deliberate violation of the law is unquestionably a ground for cancellation of permits.

5. As a result of this delivery Frank-Lin's license was suspended for seven days.

judgment that the Texas regulatory scheme, as applied to purchases of alcoholic beverages by the NFIs, was unconstitutional. Specifically, the government urged that the alcohol procurement procedure described in 32 C.F.R. § 261.4(c), *see* n. 3 *supra*, by virtue of the Supremacy Clause of the United States Constitution, art. VI, cl. 2, exempted NFIs from compliance with Texas' regulatory procedures. The district court reasoned that the Supremacy Clause would be implicated and such an exemption would occur only if the two sets of legislation posed an irreconcilable conflict. *See Department of Alcoholic Beverage Control v. Williams*, _____U.S._____, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). Finding that the federal and state regulations could coexist without violence to either, the district court concluded that the Alcoholic Beverage Code was constitutional as applied to the NFIs.

For the reasons stated below, we find that the district court was mistaken in its application of the Supremacy Clause and its attendant preemption principles. Accordingly, we reverse its judgment.

THE ANALYTICAL FRAMEWORK

It is beyond peradventure that the Supremacy Clause of the United States Constitution is implicated only where Congress exercises a granted power. *See* U.S. Cons. amend. X. Within these limited contours federal law will preempt the operation of any corresponding state legislation where there is an actual conflict between the two sets of legislation such that both cannot stand. *See Williams, supra.* This general rule is more easily stated than applied. In consequence, courts have employed a two-tier analytical framework to determine the applicability and effect of the preemption doctrine in a given case.

The threshold consideration of the traditional analysis is one of jurisdiction. Here, the relevant inquiry is

quiry is whether the subject matter at issue is within the exclusive domain of the federal government. If it is purely a federal concern, the Supremacy Clause preempts all state regulation that would vitiate the impact or intent of the federal regulatory scheme.[6] In determining whether the federal government occupies a zone of exclusive authority it is necessary to look beyond the facial implications of the issues to whether the essence of the subject matter is inextricably linked to traditional notions of sovereignty. *See Johnson v. State of Maryland*, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126 (1920)(a state cannot indirectly regulate the delivery of mail by requiring a driver's license where federal statute expressly provides that mail carrier's competence to drive is to be determined by superiors); *Mayo v. United States*, 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504 (1943)(a state cannot require licensing of construction contractor where work is to be done exclusively on a federal enclave).

Beyond those areas where Congress exercises plenary power, the traditional analysis requires a balancing of federal and state interests to determine the applicable law. To this end (1) the pervasiveness of the federal regulatory scheme, (2) whether federal occupation of the field is necessitated by a need for national uniformity, (3) the danger of conflict between state laws and the administration of federal programs, and (4) whether the state regulation infringes upon individual constitutional

6. State regulatory schemes that merely impose upon federal regulation or activity, without vitiating its impact or intent, can be valid exercises of state authority. *See Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 270-71, 63 S.Ct. 617, 621, 87 L.Ed. 748 (1943) (where incidence of tax not directly on government there is no violation of the Supremcacy Clause); *Hancock v. Train*, 426 U.S. 167, 179-80, 96 S.Ct. 2006, 2013, 48 L.Ed.2d 555 (1976) ("[n]either the Supremacy Clause nor the Plenary Powers Clause bars all state regulation which may touch the activities of the federal government").

guarantees, are the primary considerations to be weighed. *See Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 851 (1941); *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956). *See also*, Hirsh, Toward a New View of Federal Preemption, 1972 I.Ill.L.F. 515. Because the above considerations are for the most part reasoned judgment calls, the line of demarcation between federal and state authority is often unlcear. It is against this background that our analysis of the present action begins.

EXCLUSIVE ZONE OF FEDERAL JURISDICTION

The district court held that absent an irreconcilable conflict between the Alcoholic Beverage Code and the government procurement regulation in question, the Code must necessarily prevail because it implicates the Twenty-first Amendment. In reaching this conclusion the trial judge relied upon our opinion in *Castlewood International Corporation v. Simon*, 596 F.2d 638 (5th Cir. 1979), *cert. granted*, 446 U.S. 949, 100 S.Ct. 2914, 64 L.Ed.2d 806, *j'ment vacated and remanded*, 626 F.2d 1200 (5th Cir. 1980). There we rejected an administrative agency's attempt to override a state regulation relating to liquor, reasoning:

> [A]ny analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme. *Id.* at 642.

While we acknowledge the continued vatality of *Castlewood* it simply does not govern the present case.

The touchstone of our anaysis in *Castlewood* was that the Twenty-first Amendment represents a significant departure from the normal operation of the Commerce Clause and as such permits state regulation that would otherwise fail as a result of conflicting with that constitutional provision. *Id.* Because our examination revealed the absence of a federal interest of sufficient magnitude, beyond those expressly preempted by the Twenty-first Amendment, we held that the state regulatory scheme must prevail. It is important to note that a balancing of interests occurred only after a threshold, albeit implicit, determination of concurrent authority and jurisdiction and an equally implicit finding that the federal government's interest was not premised solely upon the Commerce Clause. Beyond these narrow limits *Castlewood* has no vitality. The Twenty-first Amendment does not, indeed cannot, touch upon those circumstances or transactions where either the federal government occupies a zone of exclusive authority or state regulation significantly affects an area of federal concern beyond the Commerce Clause.

A major premise of the district court's analysis was its assumption that the State of Texas has the requisite jurisdiction, by virtue of the Twenty-first Amendment, to impose its legislative will upon federal enclaves located within the State. Neither our reading of the plain language of that constitutional amendment[7] nor the relevant case law support such an assumption. In the seminal case of *Collins v. Yosemite Park & Curry Co.*,

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7. The Twenty-first Amendment provides:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938), the State of California's liquor licensing requirements were held not to apply to a corporation selling alcoholic beverages at the Yosemite National Park on land leased from the federal government. *Id.* at 533, 58 S.Ct. at 1016. The Court reasoned that because regulation is inextricably tied to traditional notions of sovereignty, California lacked jurisdiction, by virtue of the Twenty-first Amendment or otherwise, to regulate the sale, distribution or consumption of alcohol on a federal enclave located within the State. *Id.* at 538, 58 S.Ct. at 1018.

Similarly, in *United States v. Tax Commission of Mississippi*, 412 U.S. 363, 93 S.Ct. 2183, 37 L.Ed.2d 1 (1973), the Court held that the Twenty-first Amendment has no application where transactions relating to alcoholic beverages occur between out-of-state suppliers and military enclaves located within a state. *Id.* at 380, 93 S.Ct. at 2193. Mississippi had sought to regulate the procurement of alcoholic beverages by four NFIs located in that State by compelling them to make purchases either from the State Tax Commission, at a 17 to 20 percent markup, or directly from distillers who were obligated to collect and remit the same markup to the State. Because two of the four NFI's were located on military installations that were "exclusive" as opposed to "concurrent" jurisdiction facilities, the case initially turned on the resolution of a conflict between the State's asserted scope of the Twenty-first Amendment and the exclusive federal authority over such military facilities as directed by Article I, Section 8, Clause 17 of the United States Constitution.[8] In balancing these com-

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8. Article 1, Section 8, cl. 17 of the United States Constition provides:

Section 8. The Congress shall have power...

* * * * * * * * * * * *

(footnote continued on following page)

peting arguments the Court held that the Twenty-first Amendment was not implicated because there was no importation of liquor into Mississippi "for delivery or use therein." *Id.* at 375, 93 S.Ct. at 2191; *see supra* n. 7. To this end the Court reasoned

> [I]t suffices to note that any legitimate state interest in regulating the importation into Mississippi of liquor purchased on the bases by individuals cannot effect an extension of the State's territorial jurisdiction so as to permit it to regulate the distinct transactions between the suppliers and the nonappropriated fund activities that involve only the importation of liquor into federal enclaves which 'are to Mississippi as the territory of one of her sister states or a foreign land,' 340 F.Supp. [903], at 906. *To conclude otherwise would be to give an unintended scope to a provision designed only to augment the powers of the State to regulate the importation of liquor destined for use, distribution, or consumption* in its own territory, not to 'increase its jurisdiction,' *Collins v. Yosemite Park & Curry Co.*, 304 U.S., at 538, 58 S.Ct. at 1018, 82 L.Ed. 1502.

(footnote continued from previous page)

17. To exercise exclusive Legislation in all Cases whatsoever over such District (not Exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the consent of the Legislature of the State in which the same shall be, for the Erection of Forest, Magazines, Arsenals, dock-Yards, and other needful buildings;

The record reveals some doubt as to whether the military installations here are subject to concurrent or exclusvie jurisdiction. Because of the Supreme Court's decisions in *Tax Commission, supra*, and *Tax Commission (II)*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975), we believe that the present issues are unaffected by such distinctions since there is no contention that the State has reserved the right to regulate alcoholic beverages on those enclaves subject to concurrent jurisdiction.

Id. at 378, 93 S.Ct. at 2192. (emphasis supplied).

After disposing of this issue the court remanded the case for further proceedings, including the issue of whether the 'concurrent' jurisdiction facilities were exempt from state regulation.

After remand, the case was again appealed to the Supreme Court, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975) ("Tax Commission II"). In the course of concluding that the legal incidence of Mississippi's markup was on the United States, the Court faced a challenge, on the basis of the Twenty-first Amendment, to the federal government's constitutional immunity from taxation by the states. *Id.* at 601, 95 S.Ct. at 1874. The Court's rejection of this challenge was unequivocal, summarizing its analysis of the scope of a state's regulatory powers under the Twenty-first Amendment as follows:

> When the case was last here we held that 'the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction [pursuant to Art. I, § 8, cl. 17, of the Constitution].' 412 U.S., at 375, 37 L.Ed.2d 1, 93 S.Ct. 2183, 2191; *see Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538, 82 L.Ed. 1502, 58 S.Ct. 1009, 1018 (1938). *Cf. James v. Dravo Contracting Co.*, 302 U.S. 134, 140, 82 L.Ed. 155, 58 S.Ct. 208, 212, 114 ALR 318 (1937). We reach the same conclusion as to the concurrent jurisdiction bases to which Art. I, § 8, cl. 17, does not apply: 'Nothing in the language of the [Twenty-first] Amendment nor in its history leads to [the] extraordinary conclusion' that the Amendment abolished federal immunity with respect to taxes on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction.

421 U.S. at 613-14.

We are persuaded that *Yosemite Park* and its progeny do little more that reaffirm the general proposition that the federal government, as a sovereign and absent a voluntary relinquishment of its sovereign rights, exercises exclusive jurisdiction over federal enclaves. We are also persuaded that regulation is an incident of sovereignty. This is not to say that a state may not institute measures designed to prevent the unlawful diversion of alcohol destined for a federal enclave into the state's stream of commerce. *See Tax Commission, supra*, 412 U.S. at 377, 93 S.Ct. at 2192. While the functional limits of that sort of state regulation have yet to be determined, the present action does not concern it and is clearly beyond a state's regulatory powers. Like the mark-up in *Tax Commission*, there is no indication here that the Texas law under examination "is an effort to deal with problems of diversion of liquor from out-of-state shipments destined for ...the...bases." *See* Tax Commission, *supra*, at 378, 93 S.Ct. at 2192.

Accordingly, the district court's judgment is

REVERSED.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellant,

V.

The STATE of TEXAS, et al.,
Defendants-Appellees.

No. 81-1597.

United States Court of Appeals,
Fifth Circuit.

March 17, 1983.

Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 10, 1983, 5 Cir., 1983, 695 F.2d 136).

Before BROWN, GEE and JOLLY, Circuit Judges.

PER CURIAM:

The opinion is revised, so that the phrase "On this same date," appearing immediately after note call 4, slip op. p. 1738, col. 2, 695 F.2d p. 137, col. 2, is replaced by "At a later date." In all other respects, the Petition for Rehearing is DENIED; and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appeliat Procedure; Local Fifth Circuit Rule 16), the Suggestion for Rehearing En Banc is DENIED.

APPENDIX C

Judgment on Decision by the Court

UNITED STATES DISTRICT COURT

For The

WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action File No. A-79-CA-79

United States of America	
vs.	Judgment
The State of Texas; Texas Alcoholic Beverage Commission and W.S. McBeath as Administrator of the Texas Alcoholic Beverage Commission, and Licensed Beverage Distributors, Inc.	

This action came on for trial before the Court, Honorable JACK ROBERTS, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged after careful consideration, the Court is of the opinion that there is no apparent conflict between the federal regulation and the state regulations in question, other than the conflict fabricated by the Plaintiff and its instrumentalities for the purposes of this suit. The United States and its own regulation concerning the procurement of alcohol and seek the "most advantageous contract" which includes the best price available within the confines of compliance with the state regulatory scheme which is certainly the most important "other factor" to be considered.

All relief sought by the parties to this suit which is not expressly granted herein is denied and the Clerk shall enter Judgment in conformity with this Memorandum Opinion and Order. This opinion shall constitute Findings of Fact and Conclusions of law.

Dated at Austin, Texas, this 27th day of October, 1981.

CHARLES W. VAGNER
Clerk of Court

By_____
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

United States of America,	§	
	§	
Plaintiff	§	
	§	
V.	§	
	§	
The State of Texas; Texas Alcoholic Beverage Commission and W.S. McBeath as Administrator of the Texas Alcoholic Beverage Commission,	§	Civil Action No. A-79-CA-79
Defendants	§	
	§	
and	§	
	§	
Licensed Beverage Distributors Inc.,	§	
Intervenors.	§	
	§	

MEMORANDUM OPINION AND ORDER

This case was heard before Judge Jack Roberts on September 14, 1981 in a non-jury trial on the merits in Austin, Texas. Jurisdiction of this action is conferred on this Court by 28 U.S.C. §§1345, 2201 and 2202. After careful consideration of all the pleadings, briefs, testimony, evidence and arguments presented at trial, the Court enters the following Memorandum Opinion which shall constitute Findings of Fact and Conclusions of Law.

Plaintiff United States of America filed its original complaint on April 23, 1979 seeking declaratory and injunctive relief to prevent Defendants the State of Texas, The Texas Alcoholic Beverage Commission and W.S. McBeath as Administrator of the Texas Alcoholic Beverage Commission, from attempting to tax or otherwise interfere with procurement of alcoholic beverages by the Department of Navy's Nonappropriated Fund Instrumentalities (hereinafter referred to as NFI's) and other NFI's of the United States.

On September 14, 1979, Licensed Beverage Distributors, Inc. a trade association whose members are holders of various kinds of wholesaler's permits issued under the Texas Alcoholic Beverages Code, filed its motion to intervene. Said motion was granted on October 5, 1979.

Plaintiff filed a motion for summary judgement on October 18, 1979 which was denied by the Court on January 30, 1980. On February 20, 1980, Plaintiff filed a motion for reconsideration of its motion for summary judgment citing *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) and *Goldstein v. Miller,* 488 F.Supp. 156 (D. Md. 1980) in support thereof. After consideration of said cases the Court affirmed its earlier denial of Plaintiff's motion for Summary Judgment.

On August 11, 1980, Plaintiff filed a motion for voluntary dismissal of this suit pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. Defendant and Intervenor strenuously opposed said dismissal. Upon noting that Defendant and Intervenor had expended considerable effort and expense in preparation of their defense and earnestly desired this controversy to be resolved and further that Plaintiff offered no explanation for its motion to dismiss, the Court concluded that dismissal was inappropriate and denied the motion.

FACTS AND ISSUES

Plaintiff United States brought this suit seeking Court approval of attempts by its officers and employees in charge of the Consolidated Package Stores at Chase Field Naval Air Station in Beeville, Texas (an NFI) to purchase alcoholic beverages outside the State and ship such beverages to the NFI's facilities in Texas for resale. This action would circumvent regulation by the Texas Alcoholic Beverage Commission and the gallonage tax imposed on wholesalers as part of the Texas regulatory scheme. Plaintiff attempted to purchase alcoholic beverages directly from non-resident wholesalers on September 25, 1978 from National Distillers Product Company of New York and subsequently in May of 1981 from Frank-Lin Distillers Products, Limited of California.

The Texas Alcoholic Beverage Code requires a license for any kind of dealing in alcoholic beverages in the State of Texas (Sections 11.01 and 61.01, Alcoholic Beverage Code, V.T.C.S.). The holders of such licenses are authorized to purchase and import alcohol from holders of nonresident seller's permits or their agents (Chapter 20, 21 and 22, Alcoholic Beverage Code, V.T.C.S.). Holders of nonresident seller's permits are only authorized to take orders for alcohol and to ship alcohol to authorized licensees within the State of Texas (Section 37.01, Alcoholic Beverage Code, V.T.C.S.).

Plaintiff's actions in attempting to purchase alcohol directly from non-resident wholesalers were not within the confines of the Texas Regulatory scheme. Plaintiff claims that such actions are mandated by 32 C.F.R. §261.4(c)(1) which states:

> (c) Cooperation: (1) DOD will cooperate with all duly constituted regulatory officials (local, State and Federal) to the degree that the duties

> of such officials are related to the furtherance of the terms of this part. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered.

The issues in this suit, although variously defined by Plaintiff, Defendant and Intervenor at different points in time, appear to the Court to be two-pronged: (1) Whether 32 C.F.R. §261.4(c)(1) dictates that Plaintiff should circumvent the Texas Alcoholic Beverage Code by purchasing alcohol out of the State and (2) If 32 C.F.R. §261.4(c)(1) mandates out of State purchases of alcohol by the Plaintiff and its NFI's, then does a federal interest of sufficient magnitude exist to uphold the federal regulation over the State Alcoholic Beverage Code in light of section 2 of the 21st Amendment? As the Court finds that Plaintiff has misinterpreted 32 C.F.R. §261.4(c)(1) in that it does not affirmatively require Plaintiff to violate the Texas Alcoholic Beverage Code, the Court sees no necessity to reach the Constitutional issue posed in issue two above.

Underlying the alleged regulatory conflict in this case has been the spector of State taxation of a federal entity. The importance of this taxation question has waxed and waned throughout the course of this suit. It has long been held that the federal government is immune from taxation by the States based on the Supremacy Clause, *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819). The standard employed by the Supreme Court in recent years to determine whether a state tax improperly touches the federal government is the determination of where the legal incidence of the tax falls. See *U.S. v. State Tax Commission of Mississippi*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975).

Initially Plaintiff complained of Defendant's attempt "to tax or otherwise interfere with the procurement of alcoholic beverages..." (See Plaintiff's Original Complaint at page 1). However, at several points in its briefs the government concedes that this is not a tax case and at trial Plaintiff's counsel offered to stipulate that the State of Texas was not seeking to impose a tax directly on the federal government. Although the cost the NFI is seeking to avoid by purchasing alcohol out of state is in fact the Texas gallonage tax imposed on wholesalers, the crux of the controversy in this cause is the alleged conflict between the federal regulation and the Texas Alcoholic Beverage Code which includes the tax on wholesalers.

THE ALLEGED CONFLICT

32 C.F.R. §261.4(c)(1) was promulgated pursuant to the authority of the 1951 Amendments to the Universal Military Training and Service Act, 30 U.S.C. App. §473 which states in pertinent part:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps.

This statute addresses the regulation of alcohol on or about military bases but does not express an intent to entirely co-opt and ignore the States' regulations of the procurement of alcohol. The State of Texas makes no pretense towards regulating alcoholic beverages once they have reached a federal enclave. Plaintiff has inter-

preted the last sentence of 32 C.F.R. §261.4(c)(1) which states "...shall obtain for the Government the most advantageous contract, price and other factors considered" as calling for out of state purchases of alcohol thereby circumventing the Texas gallonage tax levied on wholesalers of alcohol and the Texas regulations over the importation of alcohol.

The Texas Alcoholic Beverage Code was enacted pursuant to the express regulatory authority granted the States under §2 of the 21st Amendment to the United States Constitution which reads:

> Sec. 2 The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The United States Supreme Court has consistently held that regulations by the States of alcoholic beverages under the 21st Amendment have a special status. In *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) Justice Rehnquist writing for the majority stated:

> While the States, vested as they are with general police power, required no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment "a State is totally unconfined by traditional Commerce Clause limitations when

it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."

The evidence produced at the trial of this case clearly demonstrates that the Texas regulatory scheme is designed to and does in fact protect the public health and welfare of the people of Texas. The federal government does not appear to contest the validity of the regulation of alcoholic beverage distribution in Texas in general. However, Plaintiff argues on the basis of the Supremacy Clause that these State regulations are inapplicable to the federal government in the case of a conflict between State and Federal regulations. Plaintiff states in its post-trial brief: "The evidence produced at the trial of this case disclosed a dynamic conflict between two regulatory systems." (Plaintiff's Memorandum Following Trial, page 1.)

The Court finds that the evidence did not demonstrate any conflict between the State and Federal regulations and that the NFI in question did not strictly comply with its own interpretation of the Federal regulation.

The testimony of Robert L. Franke, former Administrative Officer at Chase Field Naval Air Station in Beeville, Texas established that the NFI in this particular case did not attempt to procure alcohol at the lowest available price within the State of Texas or from out of State wholesalers. He stated at trial that they followed an informal procedure in trying to procure alcohol at the best available price. (Trial Transcipt at 24.) Mr. Franke testified that he attempted through his manager to purchase alcohol directly from National Distillers of New York in September of 1978 without verifying that they offered the cheapest available price. Further, the limited quantities ordered by the NFI in the transactions that are at issue in this suit were clearly not designed to obtain the best available price.

The Court finds, based on the testimony and evidence, that the one attempted and one successful out of state purchase of alcohol were transactions formulated by the Plaintiff to test the State regulatory scheme for alcohol. The main purpose of their actions in this suit and the events surrounding it was to circumvent the State's regulation of alcohol and the tax which is part of that scheme. The United States, the Navy and the NFI in question did not follow their own policy of cooperation elucidated in 32 C.F.R. §261.4(c)(1). The evidence and testimony established that the government equated the phrase "most advantageous contract" with best price, while ignoring other factors which should have been considered. The paramount factor which should be considered in cases of this nature is the great deference reserved for state regulation of alcohol. In *Castlewood International Corporation v. Simon*, 596 F.2d 638 (5th Cir. 1979), cert. granted, 446 U.S. 949, j'ment vacated and remanded, 626 F.2d 1200 (5th Cir. 1980) the Circuit Court stated:

> Thus any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme. *Id.* at 642.

On remand from the Supreme Court for further consideration in light of *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Circuit Court reaffirmed its earlier decision by finding that there was no federal interest of sufficient magnitude to outweigh the state interests.

The Court concludes that the correct interpretation of 32 C.F.R. §261.4(c)(1) which is consistent with the authorizing statute, the U.S. Constitution and the case law in this area, is that the federal Plaintiff should attempt to procure the most advantageous contract for purchasing alcohol while at the same time complying with the Texas Alcoholic Beverage Code.

CONCLUSION

After careful consideration, the Court is of the opinion that there is no apparent conflict between the federal regulation and the state regulations in question, other than the conflict fabricated by the Plaintiff and its instrumentalities for the purposes of this suit. The United States and its various instrumentalities shall henceforth comply with its own regulation concerning the procurement of alcohol and seek the "most advantageous contract" which includes the best price available within the confines of compliance with the state regulatory scheme which is certainly the most important "other factor" to be considered.

All relief sought by the parties to this suit which is not expressly granted herein is denied and the Clerk shall enter Judgment in conformity with this Memorandum Opinion and Order. This opinion shall constitute Findings of Fact and Conclusions of Law.

ENTERED on this the 27th day of October, 1981 at Austin, Texas.

/s/ Jack Roberts

JACK ROBERTS
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

United States of America	*	
	*	
	*	
V.	*	Civil Action No.
	*	A-79-CA-79
	*	
The State of Texas, Et Al.	*	

ORDER

Came on this day for consideration by the Court Plaintiff's Motion for Summary Judgment. After careful consideration of the motion and the briefs, the Court is of the opinion that the motion is without merit and should be denied.

In this action the Plaintiff, the United States of America, alleges that the Defendants, the State of Texas and the Texas Alcoholic Beverage Commission, have attempted to illegally tax or otherwise interfere with the alcoholic beverage procurement activities of instrumentalities of the United States. Plaintiff seeks a declaratory judgment that all nonappropriated fund instrumentalities of the United States located within the State of Texas may purchase alcoholic beverages outside the State of Texas and ship such beverages to facilities within the State of Texas for purpose of resale without liability for alcoholic beverage taxes imposed by the State of Texas and free from regulation by the State of Texas. The Plaintiff also requests that the Court enjoin the Defendants from taking any action to interfere with the procurement of alcoholic beverages from outside the State of Texas by nonappropriated fund instrumentalities of the United States located in Texas.

The Plaintiff's claim, in simplified form, is that the Defendants' regulation and taxation of alcoholic beverages purchased by Plaintiff's military installations conflicts with Plaintiff's own regulation, and accordingly, the Defendants' regulation and taxation should cease.

Plaintiff points to 50 U.S.C., Appendix, § 473, which says the Secretary of Defense is authorized to make such regulations as he deems necessary to govern the sale, consumption, possession of or traffic in alcoholic beverages, and 32 C.F.R. § 261.4(c) which states in part that, "the purchase of all alcoholic beverages ...shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price, and other factors considered."

The Court initially notes that state regulation of alcoholic beverages occupies a unique position. As was noted in Castlewood International Corporation v. Simon, 596 F.2nd 638 (5th Cir. 1979),

> "...any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme." *Id.* at 642.

In Castelwood, the Fifth Circuit Court of Appeals noted in their discussion of the Supremacy Clause argument that:

> "Federal laws have prevailed over state regulation of intoxicating liquors in only two circumstances: (1) where the state regulation was repugnant to overriding national concern with due process and equal protection, and (2) where the state has sought to invade an area of exclusive federal concern..." *Id.* at 643.

Plaintiff claims that Defendants' regulations requiring Plaintiff to purchase alcoholic beverages from vendors who have been issued Texas permits results in Plaintiff having to pay the Texas gallonage tax, and such conflicts with the federal regulation that alcoholic beverages be obtained at the most advantageous price. Plaintiff cites United States v. State Tax Commission of Mississippi, 421 U.S. 599 (1975) in support of the contention. Careful examination of that decision reveals that it provides no support for the Plaintiff's claim. The Mississippi statute in question there required that the state tax be passed on to the purchaser. Such is not the case in the Texas regulatory scheme as there is no requirement that the legal incidence of the tax fall on the government. As the affidavits filed in opposition to Plaintiff's Motion for Summary Judgment indicate, the Texas taxes are absorbed by the liquor wholesalers and are treated as a cost of doing business. The tax situation in Texas is not unlike that system that was upheld in Polar Co. v. Andrews, 375 U.S. 361 (1964), cited with approval in United States v. State Tax Commission of Mississippi, supra, at footnote 9. It seems to this Court that the Plaintiff has failed to show that as a matter of law any conflict exists between the Plaintiff's and Defendants' regulations, accordingly, the relief requested in Plaintiff's Motion for Summary Judgment must be denied. It is accordingly

ORDERED, ADJUDGED and DECREED that the relief sought in Plaintiff's Motion for Summary Judgment be, and hereby is, DENIED.

Entered this 30th day of January, 1980, at Austin, Texas.

/s/ Jack Roberts

JACK ROBERTS, CHIEF JUDGE
WESTERN DISTRICT OF TEXAS

APPENDIX E

UNITED STATES CONSTITUTION

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

AMENDMENT XXI.
REPEAL OF PROHIBITION AMENDMENT

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therin of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution

by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

APPENDIX F

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

50 U.S.C. App. § 473

The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both. June 19, 1951, c. 144, Title I, § 6,65 Stat. 88.

APPENDIX G

TEXAS ALCOHOLIC BEVERAGE CODE PROVISIONS

Section 11.01. Permit Required

(a) No person who has not first obtained a permit of the type required for the privilege exercised may, in a wet area, do any of the following:

(1) manufacture, distill, brew, sell, possess for the purpose of sale, import into this state, export from this state, transport, distribute, warehouse, or store liquor;

(2) solicit or take orders for liquor; or

(3) for the purpose of sale, bottle, rectify, blend, treat, fortify, mix, or process liquor.

(b) A person may manufacture, distill, brew, sell, import, export, transport, distribute, warehouse, store, possess, possess for the purpose of sale, bottle, rectify, blend, treat, fortify, mix, or process liquor, or possess equipment or material designed for or capable of use for manufacturing liquor, if the right or privilege of doing so is granted by this code.

(c) A right or privilege granted by this section as an exception to prohibitions contained elsewhere in this code may be exercised only in the manner provided. An act done by a person which is not permitted by this code is unlawful.

Section 19.01. Authorized Activities

The holder of a wholesaler's permit may:

(1) purchase and import liquor from distillers, brewers, wineries, wine bottlers, rectifiers, and

manufacturers who are holders of nonresident seller's permits or from their agents who hold manufacturer's agents permits;

(2) purchase liquor from other wholesalers in the state;

(3) sell liquor in the original containers in which it is received to reatilers and wholesalers in this state authorized to sell the liquor; and

(4) sell liquor to qualified persons outside the state.

Section 20.01. Authorized Activities

The holder of a general class B wholesaler's permit may:

(1) purchase and import malt and vinous liquors from brewers, wineries, rectifiers, and wine manufacturers and wine bottlers who are the holders of nonresident seller's permits or their agents who are holders of manufacturer's agent permits;

(2) purchase malt and vinous liquors from holders of brewer's permits or other wholesalers in the state;

(3) sell the malt and vinous liquors in the original containers in which they are received to retailers and wholesalers authorized to sell them in this state, including holders of local distributor's permits, mixed beverage permits, and daily temporary mixed beverage permits; and

(4) sell the malt and vinous liquors to qualified persons outside the state.

Section 22.01. Authorized Activities

The holder of a package store permit may:

(1) purchase liquor in this state from the holder of a class A winery, class B winery, wholesaler's, class B wholesaler's, or wine bottler's permit;

(2) sell liquor in unbroken original containers on or from his licensed premises at retail to consumers for off-premises consumption only and not for the purpose of resale, except that if the permittee is a hotel, the permittee may deliver unbroken packages of liquor to bona fide guests of the hotel in their rooms for consumption in their rooms;

(3) sell malt and vinous liquors in original containers of not less than six ounces; and

(4) sell liquor to holders of airline beverage permits as provided in Section 34.05 of this code.

Section 37.01. Authorized Activities

The holder of a nonresident seller's permit may:

(1) solicit and take orders for liquor from permittees authorized to import liquor into this state;

(2) ship liquor into this state, or cause it to be shipped into this state, in consummation of sales made to permittees authorized to import liquor into the state.

§ 201.02. "First Sale" Defined

In this subchapter, "first sale":

(1) as applied to liquor imported into this state by the holder of a wholesaler's permit authorizing importation, means the first actual sale by the permittee to the holder of any other permit authorizing the retail sale of the beverage or to the holder of a local distributor's permit; and

(2) as applied to all other liquor, means the first sale, possession, distribution, or use in this state.

§ 201.03. Tax on Distilled Spirits

(a) A tax is imposed on the first sale of distilled spirits at the rate of $2 per gallon.

(b) The minimum tax imposed on packages of distilled spirits containing two ounces or less is five cents per package.

(c) Should packages containing less than one-half pint but more than two ounces ever be legalized in this state, the minimum tax imposed on each of these packages is $0.122.

§ 201.05. Reporting System

A person who holds a permit authorizing the importation of liquor into this state shall pay the liquor tax by the reporting system under bond.

APPENDIX H

DEPARTMENT OF DEFENSE REGULATION

32 C.F.R. § 261.4(c)

(c) Cooperation. (1) DOD will cooperate with all duly constituted regulatory officials (local, State and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other place *primarily* occupied by members of the armed forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered.

(2) This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to State control.